RECORD AND BRIEFS

No. 16-149

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
Petitioner,

v.

JODIE NEVILS,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.[1]

This is such a case. The Chamber's membership includes businesses that are subject in varying degrees to a wide range of federal regulatory schemes that contain provisions expressly preempting state and local laws. As a result, the Chamber is well suited to offer a broader perspective on preemption and keenly interested in ensuring that the regulatory environment in which its members operate is a consistent one. The Chamber has filed *amicus* briefs in prior preemption cases, including *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016); *National Meat Association v. Harris*, 132 S. Ct. 965 (2012); *AT&T Mobility LLC v. Concepcion*,

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

563 U.S. 333 (2011), *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323 (2011), *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011), *Wyeth v. Levine*, 555 U.S. 555 (2009), *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008), *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 529 U.S. 89 (2000), and is well-situated to address the issues of preemption raised here.

The Chamber has a particular interest in this case, which concerns the "presumption against preemption" that members of this Court have sometimes invoked. By making it more difficult for Congress to enact nationwide regulatory schemes, such a presumption—particularly if applied as strenuously as in the decision below—threatens to breed patchwork legal regimes that would burden the ability of multistate businesses, many of which are members of the Chamber, to operate efficiently and effectively.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the preemptive effect of the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, which includes an express preemption provision:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

Respondent Jodie Nevils is a federal employee who participates in a federal health insurance plan administered by Coventry pursuant to a contract governed by FEHBA. Pet. App. 45a. After Nevils was injured in a car accident, Coventry paid for his medical expenses pursuant to the FEHBA plan. *Id.* Nevils obtained a tort settlement from the third party who had caused his injuries, and Coventry sought subrogation or reimbursement out of the settlement proceeds as required under the terms of the FEHBA plan contract. *Id.*; *see id.* at 129a-30a.

Nevils paid the subrogation claim, but then filed this putative class action against Coventry, alleging that Coventry's pursuit of subrogation violated Missouri's common-law prohibition against subrogation claims. *Id.* at 45a. Coventry argued that FEHBA preempted application of that doctrine with respect to a FEHBA contract, but the Missouri Supreme Court twice rejected that defense. The court first held in 2014 that § 8902(m)(1) is ambiguous as to whether state anti-subrogation rules are preempted because subrogation does not clearly "relate to ... coverage or benefits," and that a presumption against preemption required resolving such an ambiguity against Coventry. *Id.* at 47a-54a. After this Court vacated that judgment and remanded for further consideration in light of a new regulation promulgated by the Office of Personnel Management ("OPM"), 135 S. Ct. 2886 (2015), the Missouri Supreme Court adhered to its prior view of the statute. Pet. App. 2a, 7a, 13a. The Missouri court also declined to defer to OPM's regulatory interpretation of § 8902(m)(1), which codifies the agency's view that

the statute preempts state anti-subrogation laws. *Id.* at 4a-13a.[2]

The Missouri Supreme Court's holding is in error, as Petitioner correctly argues. The decision below relies on the premise that, when Congress enacts a provision expressly preempting state law, the statute should be presumed to preempt as little state law as linguistically possible. That presumption, however, should be rejected as a canon of construction. The text and history of the Supremacy Clause refute any notion that the Framers intended the courts to operate under any presumption against preemption: Federal law is to control "*notwithstanding*" anything to the contrary in state law, and Congress's enactments should not be given less (or more) preemptive effect than their words would permit under ordinary principles of statutory interpretation. Employing a narrowing interpretive presumption in preemption cases makes it more difficult for Congress to achieve its specific legislative ends, and encourages the development of conflicting state regulatory regimes that burden businesses and other multistate actors. And the presumption cannot be justified on federalism grounds, for the express text and clear purpose of the Supremacy Clause allow Con-

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[2] In an opinion concurring in the result, six of the Missouri Supreme Court's seven judges expressed the view that § 8902(m)(1) is invalid because it purportedly "give[s] preemptive effect to the provisions of a contract between the federal government and a private party," thereby exceeding the proper reach of the Supremacy Clause in their view. Pet. App. 13a-14a; *see id.* at 55a-72a.

gress to execute its constitutional authority without special concern about federalism. Where Congress has stated an intention to so exercise its authority, it should be taken at its word.

Without a presumption against preemption, the decision below cannot stand. Even if there may be multiple plausible readings, the single *best* interpretation of § 8902(m)(1) is that it expressly preempts state laws barring subrogation actions in cases arising out of FEHBA contracts. The Missouri Supreme Court did not contend otherwise, but ruled that it was required to presume that Congress had expressed no such intent. Stripping out the presumption eliminates the foundation for the Missouri court's interpretation of the statute.

ARGUMENT

I. WHERE CONGRESS EXPRESSLY STATES ITS INTENTION TO PREEMPT STATE LAW, NO PRESUMPTION AGAINST PREEMPTION APPLIES

A. The Court's occasional articulation of a presumption against preemption, *e.g.*, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992), has not been uncontroversial, *see, e.g.*, *id.* at 544 (Scalia, J., concurring in judgment in part and dissenting in part). And over the past two decades this Court's reliance on any such presumption "has waned in the express pre-emption context." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 99 (2008) (Thomas, J., dissenting). That trend should continue, as there is neither need nor basis for a presumption against preemption when interpreting statutes that expressly reflect a Congressional judgment to preempt state law.

For instance, in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), the Court omitted to mention the presumption in holding that the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act preempted the plaintiff's state-law claims—notwithstanding Justice Ginsburg's reliance on it in dissent, *id.* at 334 (Ginsburg, J., dissenting). Similarly in *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011), neither the majority opinion nor Justice Breyer's separate concurrence referenced the presumption in concluding that the Vaccine Act's express preemption provision barred state-law design-defect claims against vaccine manufacturers—again notwithstanding the dissent's invocation of the presumption to support a contrary conclusion, *id.* at 267 n.15 (Sotomayor, J., dissenting). Instead, the majority invoked only "the traditional tools of statutory interpretation" in order to give a contested term "its most plausible meaning" (not necessarily its *only* plausible meaning). *Id.* at 243.[3]

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[3] Numerous other recent decisions are in accord with this trend. *See, e.g.*, *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (unanimously interpreting text of Federal Aviation Administration Authorization Act as not preempting state-law causes of action without mentioning presumption); *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011) (omitting to mention presumption in interpreting Immigration Reform and Control Act's express preemption provision); *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 534 (2009) (explicitly declining to "invoke[] the presumption against pre-emption" in interpreting express preemption clause); *see also Altria Group*, 555 U.S. at 99 (Thomas, J., dissenting) (collecting cases).

A plurality of the Court would have gone further in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), explaining that, under the Supremacy Clause, "a court need look no further than the ordinary meanin[g] of federal law, and should not distort federal law to accommodate conflicting state law," *id.* at 623 (plurality opinion) (citation and internal quotation marks omitted). The plurality expressly criticized the presumption, stating that "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *Id.* at 622.

The Court took further steps in this direction late last Term. In *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016), the Court explained that its jurisprudence on the scope of ERISA preemption rests on normal tools of statutory construction, without reference to any presumption that preemptive language should be read narrowly. *Id.* at 943. Instead, while noting that "'[p]re-emption claims turn on Congress's intent,'" the Court refused to apply any "presumption against pre-emption" in determining what that purpose was. *Id.* at 946 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). And the Court went still further in discounting the presumption in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016). There, the Court articulated the principle that, where a federal "statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Id.* at 1946 (quoting *Whiting*, 563 U.S. at 594).

The Court's treatments in *Gobeille* and *Puerto Rico*, however, have failed to eliminate the presumption's place in debates over statutory construction: The Vermont statute in *Gobeille* had invaded a "fundamental area of ERISA regulation," 136 S. Ct. at 946, and *Puerto Rico* concerned a federal statute whose "language is plain," 136 S. Ct. at 1946 (citation and internal quotation mark omitted)—suggesting that the Court might have reached the same result even if it had started with a contrary presumption. Litigants thus might yet argue, and lower courts might yet conclude, that *Gobeille* is unique to ERISA and that the principle finally announced in *Puerto Rico* is merely *dicta*. This case presents a good opportunity to erase any lingering uncertainty, for it involves a statute that may be susceptible of multiple "plausible constructions," *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006), as well as a lower-court decision that expressly rests on the presumption against preemption (Pet. App. 7a, 47a-54a). The Court should take this opportunity to provide guidance and certainty to future courts and litigants, by decisively eliminating the presumption against preemption in express preemption cases.

B. The Court's approach in *Puerto Rico* is the correct one. Most significantly, it best comports with the text and history of the Supremacy Clause's provision that, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. As a plurality of this Court explained in *PLIVA*, the "any Thing" clause "is a *non obstante* provision," employed

"to specify the degree to which a new statute was meant to repeal older, potentially conflicting statutes in the same field." 564 U.S. at 621-22 (plurality op.) (citing Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 234, 238-42, 252-53 (2000)).

In the case of the Supremacy Clause, the *non obstante* language extends to "*any* Thing" in state law, demonstrating that the Framers intended the Supremacy Clause to have the effect of *entirely* overcoming the traditional presumption against implied repeals (the historical antecedent to a presumption against preemption). The authors of the Constitution "did not want courts distorting the new law to accommodate the old." *Id.* at 622 (citing Nelson, *supra*, at 240-42). To the contrary, the Clause's historical purpose was "to remedy one of the chief defects in the Articles of Confederation by instructing courts to resolve state-federal conflicts in favor of federal law." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 402 (2004). A principle that courts should favor an unnatural statutory construction just to avoid invalidating state laws runs contrary to this purpose. And it is thus unsurprising that there is no historical "support ... for the conclusion that the [F]ramers intended any ... presumption to be read into [the Supremacy Clause]." Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. Davis L. Rev. 1, 30 (2001). Instead, the Framers would have regarded the Clause as rejecting any "general presumption that federal law does not contradict state law." Nelson, *supra*, at 293; *see also, e.g.*, Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175, 184 (Clause was "designed precisely to

eliminate any residual presumption" against implied repeals of state law in the face of federal law).

The Supremacy Clause is thus best read to instruct courts facing preemption questions to employ ordinary tools of construction: In most cases they should "look no further than 'the ordinary meanin[g]' of federal law" and "should not distort federal law to accommodate conflicting state law." *PLIVA*, 564 U.S. at 623 (plurality op.) (quoting *Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in judgment)).

C. The plain-meaning approach of *Puerto Rico* and the *PLIVA* plurality, moreover, appropriately respects the separation of powers. As this Court has frequently stated, "the ultimate touchstone in every pre-emption case" is Congressional intent. *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). And as with every statute, the language selected by Congress "necessarily contains the best evidence" of Congressional intent. *Whiting*, 563 U.S. at 594; *accord, e.g.*, *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991). By focusing on the words enacted by Congress, guided where necessary by normal statutory-construction tools, courts avoid imposing artificial barriers to the accomplishment of Congress's aims. In contrast, the judicially-created presumption against preemption artificially restrains Congress's power, "risk[ing] ... illegitimate expansion of the judicial function" through unintended narrowing of statutory language. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2092 (2000).

A presumption against preemption also risks upsetting the federal-state balance established by the Constitution. Where Congress foresees conflict with state law, it faces a Hobson's choice between two undesirable options if constrained by such a presumption. It might try to enumerate every kind of law that it wishes to preempt. But this creates an absurd situation in which a "statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power." *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring in judgment in part and dissenting in part). Such a patchwork of specific preemption clauses, moreover, would "disrupt the constitutional division of power between federal and state governments" by unduly enabling states to find and exploit loopholes in federal statutory schemes. *See* Dinh, *supra*, at 2092.

Alternatively, Congress could enact sweeping preemptive language creating exclusive federal authority over an entire field in which the States have no authority to regulate whatsoever. But that too may distort Congressional intent wherever its goal is merely to regulate in discrete areas, leaving other subjects to the States. A presumption against preemption makes it more difficult to draw such fine lines, limiting Congress's ability to achieve its aims while respecting traditional areas of state regulation.

The way to avoid this Hobson's choice is to disavow an extra-constitutional presumption against preemption, and instead to employ, in preemption cases as in others, the ordinary tools of statutory

construction—text, context, structure, history, purpose—to discern Congress's preemptive intent.

D. The typical rationale advanced for the presumption against preemption is putative respect for "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (Blackmun, J., concurring in part and dissenting in part). But those justifications fail for reasons set forth above.

Concerns about protecting the federal system enacted by the Constitution are fully answered by the Supremacy Clause itself. A central part of the Framers' scheme was to permit Congress, acting within the scope of its powers, to override state law where necessary to the national interest. *See, e.g.*, Sloss, *supra*, at 401-02. It thus does not matter how "compelling" a State's interest is in regulating in an area preempted by Congress: "under the Supremacy Clause, from which our pre-emption doctrine is derived, *any* state law"—even one "clearly within a State's acknowledged power, which interferes with or is contrary to federal law"—"must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal quotation marks omitted). Where Congress has the power to regulate, the forum for addressing federalism questions such as the "wisdom of national regulation" and the "balance between regulatory uniformity and policy innovations" is the Capitol, not the courthouse. *See* Dinh, *supra*, at 2092. Maintaining a presumption against Congress's exercise of its constitutional authority alters rather than protects the federal scheme.

The Supremacy Clause also answers objections rooted in state sovereignty, for it expressly proclaims

that the States' regulatory authority is subordinate to federal power. And, as discussed, a presumption against preemption upsets the federal-state balance, both restricting the ways in which Congress can seek to address nationwide problems and encouraging it to adopt overbroad schemes in order to prevent state intrusion.

Neither federalism nor state sovereignty is harmed by a rule under which Congress's words are given their ordinary meaning in the preemption context, as in any other. And where Congress has expressly determined that the best course is to override state regulatory authority, application of a presumption against preemption will undesirably encourage the development of a patchwork of state regulations to fill "holes" purportedly (but perhaps unintentionally) left by Congress in its statutory scheme. To avoid that outcome, this Court should explicitly reaffirm that the rule in *Puerto Rico* applies in all express-preemption cases.

II. FEHBA PREEMPTS STATE ANTI-SUBROGATION LAWS

In the absence of a presumption against preemption, the construction of § 8902(m)(1) adopted by the Missouri Supreme Court cannot stand. The best reading of the statute is that Congress expressly intended to preempt state anti-subrogation laws. It provides, in relevant part, that federal law preempts state-law regulation of FEHBA plan provisions "which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." 5 U.S.C. § 8902(m)(1). The question for preemption purposes is whether contractual

subrogation and reimbursement provisions fall within the scope of that clause. They do.

First, FEHBA contract terms concerning subrogation and reimbursement "relate to" the "extent" and "provision" of employees' "coverage" and "benefits," *id.*, because such terms impose conditions and restrictions on the extent of coverage and benefits provided under the plan. Specifically, as the Tenth Circuit has explained, "a carrier's contractual right to reimbursement and subrogation *arises from* its payment of benefits; and an enrollee's ultimate entitlement to benefit payments *is conditioned upon* providing reimbursement from any later recovery or permitting the Plan to recover on the enrollee's behalf." *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1106 (10th Cir. 2015) (emphases added). In other words, reimbursement and subrogation provisions "relate to" the provision and extent of benefits because they are "limitations on the payment of benefits." *Bell v. Blue Cross & Blue Shield of Oklahoma*, 823 F.3d 1198, 1203 (8th Cir. 2016). Reimbursement and subrogation are integral components of the coverage and benefit schemes of contracts of which they are a part, and thus necessarily "relate to" those schemes under the ordinary meaning of the words.

Second, even setting aside the question whether subrogation and reimbursement "relate to" "coverage" and "benefits" themselves, they clearly "relate to" "payments with respect to benefits." 5 U.S.C. § 8902(m)(1). A subrogation or reimbursement clause in fact directly provides for "payments with respect to benefits": Where the recipient of benefits brings a claim against a third party, the contract al-

lows the insurer to seek repayment of benefits already paid—creating a new payment obligation that is directly tied to the initial benefit payment. *See Bell*, 823 F.3d at 1204 (subrogation or repayment clause "relates to 'payments with respect to benefits' because, after an insured recovers from a third party, the contract results in repayment of funds that were previously received as benefits").

The Missouri Supreme Court's decision provides no basis to conclude that this ordinary-meaning reading of the statute is incorrect. Rather, the decision below rests on the presumption against preemption, reasoning that the presumption demanded a narrow reading of the statutory phrase "relate to," so as to "requir[e] a direct and immediate relationship to the insurance coverage and benefits at issue." Pet. App. 51a-52a. And respondent, in his brief in opposition (at 22-25), similarly failed to engage with the statutory text—relying exclusively on the presumption against preemption and the purported need to narrowly interpret § 8902(m)(1). The presumption against preemption is thus an integral step in any argument in favor of the decision below. A holding that no such presumption applies in an express-preemption case leaves the decision below without foundation and requires its reversal.

CONCLUSION

The Court should hold that no presumption against preemption applies where Congress has enacted an express preemption provision, and should reverse the decision below.

Respectfully submitted,

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